Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–170–01 OF 2014
DAVID WONG, UMI KALTHUM AND HASNAH MOHAMMED HASHIM JJCA
24 OCTOBER 2016

Tort — Negligence — Non-delegable duty — National electricity supplier ('TNB') sued water supplier company ('Syabas') and its contractor for negligently damaging its high-voltage underground cables while doing excavation work — High Court held only contractor was liable and not Syabas — Whether concept of non-delegable duty applied to make Syabas fully liable to TNB — Whether contractor's negligence made Syabas liable as Syabas had a duty to ensure its contractor carried out its job with reasonable care and without causing damage — Whether Syabas could not escape liability by saying contractor was independent entity not under its control

The appellant ('TNB') sued the first respondent ('Syabas') and the latter's contractor (the second respondent) for RM1,499,983.60 for negligently damaging a section of its high-voltage underground cables while doing excavation work. The second respondent ('R2'), in turn, claimed indemnity from its insurer ('Lonpac') and its subcontractor ('Pembinaan Benua'). After a trial, the High Court held R2 fully liable on TNB's claim, allowed R2's claim against Lonpac in the sum of RM850,001.64 and dismissed the claims against Syabas and Pembinaan Benua. The court held that Syabas was not vicariously liable for R2's acts. Inter alia, the trial court found that: (a) although there was evidence that there might have been some lapses on the part of Syabas' staff in not adequately monitoring or supervising the excavation work done by R2, that alone was insufficient to make Syabas liable; and (b) cl 12 of the contract between Syabas and R2 clearly stated that it was R2's obligation to locate and ascertain the position of TNB's underground cables and Syabas' pipes and to ensure that no damage was caused and that if any damage R2 had to bear the costs and keep Syabas indemnified at all times against all damage claims. In the instant appeal against the High Court's decision, TNB argued that the trial judge had wrongly decided the case based on the terms and conditions in the contract between Syabas and R2 to which TNB was not a party. TNB argued that the contractual relationship between the respondents was irrelevant to its case and the trial court should instead have considered whether Syabas owed TNB a non-delegable duty to ensure R2 carried out its job with reasonable care.

Held, allowing the appeal, setting aside the High Court's decision to the extent of this appeal, allowing TNB's claim against Syabas and ordering general damages to be assessed:

(1) TNB had established that the concept of non-delegable duty applied to the facts of the instant case. The determining factors were that both TNB and Syabas were public-utility vehicles which provided essential public services and the excavation works were executed on a public road making such works hazardous to the public. Public policy demanded that public-utility bodies providing essential services to the community could not extinguish their duty of care by subcontracting the work to an independent contractor as in this case (see paras 27–28).

(2) In a normal negligence action for damages, the necessity to prove fault on the part of a defendant was a condition precedent to affix liability. That was not the case when the action was premised on the contention that the defendant owed a 'non-delegable duty' to the plaintiff. In such a claim, the plaintiff was required to establish that the defendant had a duty to ensure that another party took reasonable care in the discharge of its duty of care. Under such a non-delegable duty concept, a defendant could not plead as a defence that the other party was an independent contractor not under its control. The fault of the defendant was irrelevant. What was relevant was that the defendant had to ensure that the other party performed its task with reasonable care. If the other party had been negligent in its task, the defendant would be liable for such negligence (see para 16).

(3) Any excavation work by Syabas was likely to have encountered the underground cables of TNB. So it was not surprising that Syabas was required by s 40 of the Street, Drainage and Building Act 1974 to obtain a permit from Dewan Bandaraya Kuala Lumpur to carry out the excavation work. Syabas did obtain such a permit. There was a specific requirement in the permit for Syabas to obtain TNB's permission before commencing work, and, more importantly, to do pilot trenching in concert with TNB to locate the exact position of the underground cables so as to avoid causing any damage to the same. No such pilot trenching was done by either of the respondents. Syabas' own standard protocols under Item 4.1 required contractors to 'investigate and have full knowledge of the position of existing utilities and underground services such as drains, pipes, electric cables ...' and to carry out 'detailed utility detection using radio or ultrasonic machine' with drawings submitted to its superintending officer. Syabas itself had to obtain the permission of the relevant authority (in this case TNB) before starting any works. All these requirements spoke for themselves in that unless they were complied with, damage could occur to the high-voltage power cables

which could cause power black-outs, inconvenience the public and endanger persons who resided within the vicinity of the damaged cables (see paras 20–22).

[Bahasa Malaysia summary

Perayu ('TNB') menyaman responden pertama ('Syabas') dan kontraktor responden pertama (responden kedua) sebanyak RM1,499,983.60 kerana secara cuai merosakkan seksyen kabel bawah tanah voltan tingginya semasa melaksanakan kerja penggalian. Responden kedua ('R2'), sebaliknya, menuntut indemniti daripada syarikat insuransnya ('Lonpac') dan subkontraktornya ('Pembinaan Benua'). Selepas perbicaraan, Mahkamah Tinggi memutuskan R2 bertanggungjawab sepenuhnya ke atas tuntutan TNB, membenarkan tuntutan R2 terhadap Lonpac dalam jumlah RM850,001.64 dan menolak tuntutan-tuntutan terhadap Syabas dan Pembinaan Benua. Mahkamah memutuskan bahawa Syabas tidak bertanggungjawab secara vikarius bagi tindakan R2. Antara lain, mahkamah perbicaraan mendapati bahawa: (a) walaupun terdapat keterangan bahawa mungkin terdapat beberapa kesilapan kecil oleh pihak pekerja Syabas kerana tidak memantau atau mengawasi secara secukupnya kerja penggalian yang dijalankan oleh R2, ini sahaja tidak mencukupi untuk membuatkan Syabas bertanggungjawab; dan (b) klausa 12 kontrak di antara Syabas dan R2 dengan jelas menyatakan bahawa ia adalah tanggungjawab R2 untuk mencari dan menentukan kedudukan kabel bawah tanah TNB dan paip Syabas dan untuk memastikan bahawa tiada kerosakan disebabkan dan jika terdapat apa-apa kerosakan R2 mesti menanggung kos dan mengekalkan Syabas dibayar ganti rugi pada kesemua masa terhadap kesemua tuntutan ganti rugi. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, TNB berhujah bahawa hakim perbicaraan telah secara salah memutuskan kes berdasarkan terma dan syarat di dalam kontrak di antara Syabas dan R2 yang mana TNB bukan pihak. TNB berhujah bahawa hubungan kontraktual di antara responden-responden adalah tidak relevan kepada kesnya dan mahkamah perbicaraan sepatutnya mempertimbangkan sama ada Syabas bertanggungjawab terhadap TNB kewajipan yang tidak boleh diwakilkan untuk memastikan R2 menjalankan kerjanya dengan kewajipan yang munasabah.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi setakat rayuan, membenarkan tuntutan TNB terhadap Syabas dan memerintahkan ganti rugi am ditaksirkan:

(1) TNB telah membuktikan bahawa konsep kewajipan yang tidak boleh diwakilkan digunakan kepada fakta kes ini. Faktor-faktor yang menentukan adalah kedua-dua TNB dan Syabas adalah badan utiliti awam yang memperuntukkan perkhidmatan awam yang penting dan kerja-kerja penggalian dilaksanakan atas jalan awam membuatkan kerja-kerja sedemikian bahaya kepada orang awam. Polisi awam

menuntut bahawa badan utiliti awam yang memperuntukkan perkhidmatan penting kepada masyarakat tidak boleh melenyapkan kewajipan berhati-hati mereka dengan mensubkontrakkan kerja tersebut kepada kontraktor bebas seperti dalam kes ini (lihat perenggan 27–28).

(2) Di dalam tindakan cuai biasa bagi ganti rugi, perlunya untuk membuktikan kesalahan ke atas pihak defendan adalah syarat terdahulu untuk menanggung liabiliti. Ini adalah bukan kes apabila tindakan didasarkan atas hujahan bahawa defendan menanggung 'non-delegable duty' kepada plaintif. Dalam tuntutan sedemikian, plaintif dikehendaki untuk membuktikan bahawa defendan mempunyai kewajipan untuk memastikan bahawa pihak yang lain mengambil perhatian yang sewajarnya dalam melepaskan kewajipan berhati-hatinya. Di bawah konsep kewajipan yang tidak boleh diwakilkan, defendan tidak dapat merayu sebagai pembelaan bahawa pihak yang lain adalah kontraktor bebas bukan di bawah kawalannya. Kesalahan defendan tidak relevan. Apa yang relevan adalah bahawa defendan perlu memastikan bahawa pihak yang lain menjalankan tugasnya dengan kewajipan yang munasabah. Jika pihak yang lain cuai dalam tugasnya, defendan akan bertanggungjawab bagi kecuaian sedemikian (lihat perenggan 16).

(3) Apa-apa kerja penggalian oleh Syabas mungkin akan bertembung kabel bawah tanah TNB. Oleh itu adalah tidak terkejut bahawa Syabas dikehendaki oleh s 40 Akta Jalan, Saliran dan Bangunan 1974 untuk mendapatkan permit daripada Dewan Bandaraya Kuala Lumpur untuk menjalankan kerja penggalian. Syabas memang mendapatkan permit sedemikian. Terdapat kehendak spesifik di dalam permit untuk Syabas mendapatkan kelulusan TNB sebelum memulakan kerja, dan lebih penting lagi, untuk membuat perparitan rintis bersama dengan TNB untuk mengesan kedudukan tepat kabel bawah tanah untuk mengelak daripada menyebabkan apa-apa kerosakan kepadanya. Tidak terdapat perparitan rintis dilakukan oleh kedua-dua responden. Protokol standard sendiri Syabas di bawah perkara 4.1 memperlukan kontraktor-kontraktor untuk 'investigate and have full knowledge of the position of existing utilities and underground services such as drains, pipes, electric cables ...' dan menjalankan 'detailed utility detection using radio or ultrasonic machine' dengan mengemukakan lukisan kepada pegawai pengawasnya. Syabas sendiri perlu untuk mendapatkan kelulusan daripada pihak berkuasa relevan (dalam kes ini TNB) sebelum memulakan apa-apa kerja. Kesemua kehendak ini adalah jelas di mana kecuali jika ia dipatuhi, kerosakan boleh berlaku kepada kabel kuasa voltan tinggi ini yang mana boleh menyebabkan gangguan bekalan letrik, menyusahkan orang awam dan membahayakan orang-orang yang tinggal dalam kawasan kabel yang rosak tersebut (lihat perenggan 20–22).]

Notes

For cases on negligence in general, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1096–2229.

Cases referred to

Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234; [1993] 3 CLJ 205, SC (refd)

Holliday v National Telephone Co [1895–99] All ER Rep 359; (1899) 8 HL 443, CA (refd)

Woodland v Essex County Council [2014] 1 All ER 482; [2013] 3 WLR 1227, SC (refd)

Legislation referred to

Street, Drainage and Building Act 1974 s 40

Azlan Sulaiman (Azmi & Assoc) for the appellant.
Caroline George (Syed Alwi Ng & Co) for the respondents.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant/plaintiff against the decision of the High Court in which the learned judge dismissed the claims against the first respondent/first defendant for damages caused by the second respondent/second defendant to the underground high power cables belonging to the appellant.

[2] We heard the appeal and after due consideration to respective submissions, we allowed the appeal and now give our reasons.

BACKGROUND FACTS

[3] The appellant is the main electricity supplier in Malaysia and hence owns many underground cables around the country. In the context of this case, a section of high voltage underground cables belonging to the appellant in the Setapak residential area was damaged by excavation work of the second respondent.

[4] The first respondent's core responsibility is to provide water supply in the State of Selangor and the Federal Territory of Kuala Lumpur and Putrajaya. Much of its underground pipes and the appellant's underground cables overlap each other, hence any excavation work relating to repairs to the water pipes must be done with extra care.

[5] As a result of the damage caused by the excavation work, the appellant took legal action against the first respondent and second respondent premised on the tort of negligence. The second respondent in turn claimed indemnity from its insurer (Lonpac Insurance Bhd) and its subcontractor (Pembinaan Benua Cekap Sdn Bhd).

[6] After a full trial, the learned judge found that the second respondent was liable for the appellant's claim in the sum of RM1,499,983.60 but not the first respondent as they were not vicariously liable for the act of the second respondent. For the second respondent, its claim against Lonpac was sustained by the High Court in the sum of RM850,001.64 but the claim against its subcontractor was dismissed.

[7] The evidence against the second respondent can be summarised as follows:

(a) damages done to the cables were not from wear and tear but from external force;

(b) damages were done on 14 April 2008 corroborated by the second respondent's report to Lonpac for its claim relating to a cable damage event on that day;

(c) the only contractor doing excavation work at the site of the damaged cables by the use of a backhoe was the second respondent. Other persons present on that site were the representatives of the first respondent and its consultants; and

(d) the evidence of the driver of the backhoe had confirmed that it was his vehicle under registration No WRA 4471 which had caused the damage to the underground cables.

[8] As pointed out by learned counsel for the appellant, no appeal had been filed by the second respondent, hence the finding of the liability on the second respondent was final and binding on the first respondent.

HIGH COURT DECISION AND RATIONALE

[9] The rationale of the learned judge can be gathered from the remarks made by her when delivering her decision. The relevant remarks were these:

> So for the life of me, I just could not find anything to really substantiate or justify plaintiff's action as against Syabas although there were some evidence to the effect that some kind of the lapses in the sense that there were not adequate monitoring or supervision on the part Syabas's staffs. But that alone is not sufficient to challenge clear liability on the part of the second defendant in respect of Syabas.
>
> The document that the ... I think the clauses were clauses of ... 12, mainly 12, where

it clearly stated, if one were to look, of course evidence is evidence, but the provision, the contract between the both parties already clearly stated that. And that contract is a standard specification for piling works that was awarded to the contractor, and that contained all the guidelines, the terms and condition, which the contractor was obligated to comply.

And that cl 12 clearly stated that it was the obligation of the second defendant to in fact locate and ascertain the position of the services, which include pipes and drains and cables. It was clearly stated all those services, cable, namely, above and below the ground level, and shall adopt the methods of working to ensure no damage is caused to the services. There is nothing so ambiguous about that.

Contractors should bear expenses of damage to the instruction of the owner or authority concerned and shall keep Syabas indemnified at all times from all claims on kind of such damage.

I meant how clearer can you get than that. As I went along, and having evaluated the evidence of witnesses of course there were some … you cannot have every case that has got everything beyond reasonable doubt, it's a balance of probabilities at the end of the day.

So guided by the provisions of this contract, cl 12, cl 4, cl 9, cl 4(c) of the DBKL's permit, I looked into the totality of those provisions, I noted that there was a duty on the part of the second defendant to in fact notify DBKL and TNB prior to commencement of their works, excavation works and to conduct pilot trenching required TNB … if cable was detected during the excavation works.

I meant those you can see, it's a standard provision in the permit, in the conditions, in the specs, all that are stated. It's not just applicable to just this contractor, it's a standard document that is handled out by the Syabas for all its contractors, and that was particularly the reason I don't find any liability as against the subcontractor of the second defendant.

[10] For clarity the clauses relied on by the learned judge read as follows:

4.0 PREPARATION OF THE WORK AREA

4.1 Detection of Existing Utilities and Services

The Contractor shall investigate, and have full knowledge of the position of existing utilities and underground services such as drains, pipes, electric cables, culverts, etc. He shall take all necessary precaution as part of his work. He shall undertake the following:

(i) Detailed utility detection using radio and or ultrasonic machine. The drawings must be submitted to the S.O in 2 set in A1 size, coloured to differentiate the type of services. The type of utility, size and depth shall be clearly indicated.

(ii) Where necessary, trial pits and exploration trenches to ascertain the exact portions of these services shall be excavated, well ahead of pipe

repair/maintenance excavation, in places where they are known or thought to be and elsewhere and these shall be backfilled with approved materials.

(iii) All damages to the existing services shall be made good to the satisfaction of SYABAS and the relevant authorities. SYABAS shall be identified against any action taken against the Contractor/developer due to their negligence.

4.2 Isolation of Valves

Before any excavation, SYABAS' representative and the Contractor shall jointly locate all value pipelines in the area. (This is based on their working knowledge of the water distribution system or based on maps/water reticulation plan of the area and/or from their past experience).

(1) Ascertain the type, size and estimated length of pipe that may be affected due to the excavation and repair works. The information will enable the maintenance team to mobilize the appropriate tools, spare parts, etc. the information will be important in estimating the volume of water loss due to pipe bursts or pipe leaks.

(2) Sketch the location plan and the distribution network layout in a Record Form for updating and record purposes.

(3) SYABAS' representative shall identify all isolating and scour valves affected by the pipe to be repaired as well as valves located in the vicinity. It is important to ensure that water scouring will not result in flooding of the area, in particular the area for excavation.

Prior to excavation, shut the isolating valves as identified. As a direct effect, the pipeline pressure will drop and hence, water will stop. When this has been confirmed, the scour valves may be opened to discharge the remaining water from the main prior to excavation work.

(4) However, if water pressure neither drops nor leakage subsides after closing of the identified valve, then SYABAS' representative and his team may need to locate any possible unknown inter-connections.

12.0 PUBLIC UTILITITES AND OTHER SERVICE

(a) If utility is given as a guide, then the client shall not be held for any responsibility.

(b) The Contractor shall be responsible for locating all services including drains, pipes, cables and the like whether above or below ground level and shall adopt such methods of working as will ensure that no damage is caused to the services. The Contractor shall make good at his own expense any damage whatsoever to existing services resulting from his operation to the approval of and in accordance with the instructions of the authority or owner concerned and shall keep SYABAS indemnified at all times from all claims which may be bought against SYABAS for or on account of any damage to the said services.

> The cost of deviating or realigning any of these services shall not be borne by the Contractor but the Contractor shall provide and maintain at his own expense any temporary works necessary to support or protect the services affected by his excavation to the satisfaction of the authorities or owners concerned. The Contractor shall attend to the authorities or owners concerned and afford them all facilities necessary to enable them to undertake any work required to deviate those services or to prevent interruption of such services during the progress of the Works.
>
> All costs involved in complying with this Clause shall be deemed to have been covered by the Contract Rates or Sum unless specifically provided for in the Bill of Quantities.

[11] From our observation, it seemed that the learned judge had relied on the terms and conditions of the contract entered between the first and second respondents which the appellant was not a party to. Learned counsel for the appellant had submitted that this was where the learned judge had erred as the aforesaid contract was between the first and second respondents only.

OUR GROUNDS OF DECISION

[12] In our view, the only issue before us was simply this:

> Whether the learned judge was correct in not finding that the first respondent was liable for the claims of the appellant?

[13] To recapitulate, the claims as in the statement of claim were these:

> 5. On or around 10.04.2008 to 18.04.2008, the Defendants and/or each of them, either by themselves or their servants, agents and/or contractors, had intentionally, recklessly, negligently and/or by omission trespassed onto and/or negligently caused damage to a part of the Plaintiff's 132kV underground cables running from Kg. Lanjut, Kuala Lumpur to the Titiwangsa Main Intake Stations at Kg. Air Panas. ('the Plaintiff's Cables').
>
> *Particulars of negligence*
>
> The Defendants and/or each of them either by itself or its servants, agents and/or contractors:
>
> (i) Failed to take reasonable steps to enquire whether there were any underground cables in the vicinity of the intended excavation works prior to commencing the same.
>
> (ii) Failed to detect and ascertain the existence and placement of the Plaintiff's Cables before carrying out excavation works in the proximity of the Plaintiff's Cables.
>
> (iii) Failed to take heed of a notice dated 16.04.2008.

(iv) Failed to engage and employ competent, professional and careful servants and contractors to supervise the carrying out of the excavation works in the proximity of the Plaintiff's Cables.

(v) Carried out excavation works in the proximity of the Plaintiff's Cables without exercising due care.

(vi) Failed to take all reasonable precautionary steps before and while carrying out excavation works in the proximity of the Plaintiff's Cables.

(vii) The Plaintiff will further rely on the damage to the Plaintiff's Cables as evidence of negligence.

[14] It was the findings of the learned judge that the appellant had proved its case against the second respondent as pleaded in its statement of claim set out above and since there is no appeal by the second respondent, the second respondent's negligent acts in damaging the appellant's cables cannot be questioned by us. Hence we said above that the issue before us was whether the first respondent ought to be vicariously liable for the negligent acts of the second respondent.

[15] With respect, the aforesaid issue was not canvassed by the learned judge who had, as pointed earlier, premised her decision on the contractual relationship between the first and second respondents. This in fact was the main complaint of the counsel for the appellant who had submitted that the contractual relationship between the first and second respondents was irrelevant to the appellant's case and what the learned judge should have done was to consider whether the first respondent owed a 'non-delegable duty' to the appellant.

THE LAW — NON DELEGABLE DUTY

[16] In a normal negligence action for damages, the necessity to prove fault on the part of a defendant is a condition precedent to affix liability. That is not the case when an action is premised on a contention that the defendant owes a 'non-delegable' duty to a plaintiff. In such a claim, the plaintiff is required to establish, in the circumstance of the case, that the defendant has a duty to ensure that another party takes reasonable care in its discharge of its duty of care. Under such non-delegable duty concept, a defendant cannot plead as a defence that the other party is an independent contractor not under its control. Put it in another way, the fault of the defendant is irrelevant, what is relevant is that the defendant has to ensure that the other party has performed its task with reasonable care. If the other party had been negligent in its task, the defendant would be liable for such negligence.

[17] In the recent case of *Woodland v Essex County Council* [2014] 1 All ER

482; [2013] 3 WLR 1227, Lord Sumption had this to say under what circumstances will a non-delegable duty be imposed:

> [6] English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why. There are, however, two broad categories of case in which such a duty has been held to arise. The first is a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work. The early cases are concerned with the creation of hazards in a public place, generally in circumstances which apart from statutory authority would constitute a public nuisance: see *Pickard v Smith* (1861) 10 CBNS 470; (1861) 142 ER 535 (which appears to be the first reported case of a non-delegable duty), *Penny v Wimbledon Urban DC* [1898] 2 QB 212 and *Holliday v National Telephone Co* [1899] 2 QB 392; [1895–9] All ER Rep 359. In *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191; [1933] All ER Rep 77, the principle was applied more broadly to 'extra-hazardous' operations generally. Many of these decisions are founded on arbitrary distinctions between ordinary and extraordinary hazards which may be ripe for re-examination. Their justification, if there is one, should probably be found in a special public policy for operations involving exceptional danger to the public. But their difficulties do not need to be considered further on these appeals, because teaching children to swim, while it unquestionably involves risks and calls for precautions, is not on any view an 'extra-hazardous' activity. It can be perfectly satisfactorily analysed by reference to ordinary standards of care.
>
> [7] The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty upon the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 at p 566; [1980] AC 827 at p 848 (Lord Diplock). The analogy with public services is often close, especially in the domain of hospital treatment in the National Health Service or education at a local education authority school, where only the absence of consideration distinguishes them from the private hospital or the fee-paying school performing the same functions under contract. In the law of tort, the same consequence follows where a statute imposes on the defendant personally a positive duty to perform some function or to carry out some operation, but he performs that duty by entrusting the work to someone else for whose proper performance he is legally responsible. In *Morris v C W Martin & Sons Ltd* [1965] 2 All ER 725 at pp 730–732; [1966] 1 QB

716 at pp 725–728, Lord Denning MR analysed the liability of a non-contractual bailee for reward in similar terms, as depending on his duty to procure that proper care was exercised in the custody of the goods bailed.

[18] In the context of this case, we were of the view that the factual matrix here fitted into the first category of hazardous cases. Our reasons for this view were these.

[19] It is undisputed that both the appellant and the first respondent are major public utilities vehicles in the country. The appellant in view of the services it provides have many underground high power electrical cables around the country, a fact well known to the public and the first respondent. Similarly, the first respondent also have many underground pipelines around the State of Selangor for the supply of water.

[20] It is plain and obvious that any excavation work by the first respondent would likely encounter the underground cables of the appellant. So it is not surprising, that the first respondent was required by s 40 of the Street, Drainage and Building Act 1974 to obtain a permit from Dewan Bandaraya Kuala Lumpur to carry out such excavation work. Such permit was obtained by the first respondent for the relevant works (see D8). Not insignificant in the aforesaid permit, there was a specific requirement on the part of the first respondent to obtain the permission from the appellant prior to commencement of work and more importantly to do pilot trenching in concert with the appellant to locate the exact position of the underground cables so as to avoid any damage to the same. However as pointed out by counsel for the appellant, no such pilot trenching was done by the first respondent or the second respondent.

[21] Also not insignificant was the existence of the first respondent's own standard protocol where Item 4.1 of its Standard Specification for Pipe Laying Works requires its contractors to 'investigate and have full knowledge of the position of existing utilities and underground services such as drains, pipes, electric cables ...' and carry out 'detailed utility detection using radio or ultrasonic machine' with drawings submitted to its superintending officer. Further it is also a requirement for the first respondent to obtain permission from the relevant authority, which in this case the appellant, before the start of any works.

[22] The aforesaid requirements speak for themselves in that unless they were complied with, damage will be done to the high power cables belonging to the appellant and in such event, the public would suffer power black-out and naturally causing inconvenience. Not only that, any damage to the high power

cables could also cause dangers to persons residing within the vicinity of the damaged cables.

[23] As for supporting authorities, suffice for us to refer to *Holliday v National Telephone Co* [1895–99] All ER Rep 359; (1899) 8 HL 443 and *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234; [1993] 3 CLJ 205.

[24] In the *National Telephone Co*, the facts are these. The defendant was a telephone company tasked for laying telephone wires on the street. These wires were put through tubes which were laid in a trench under the level of the pavement. A plumber was appointed by the defendants to connect these tubes at the joints with lead and solder to the satisfaction of the defendants' foreman. To connect the tubes, it was necessary to obtain a flare from a benzoline lamp and in its attempt to obtain the necessary flare for the connection, the lamp exploded with the result that the plaintiff who was passing by on the highway was splashed with the molten solder and thereby was injured. The cause of the explosion was due to a faulty safety-valve which the plumber ought to have known and the lack of a protective screen. The action by the plaintiff for damages against the defendant was sustained by the deputy judge on the ground that the plumber was not an independent contractor but was under the supervision and control of the defendant. On appeal to the divisional court, the decision of the deputy judge was reversed on the ground that the plumber was indeed an independent contractor who had been negligent and hence caused the accident.

[25] On appeal to the Court of Appeal, the decision of the deputy judge was reinstated on two grounds. The first ground being that the plumber was not an independent contractor with the second ground premised on the concept of non-delegable duty. This is how Earl of Halsbury LC at p 398 put it:

> There is a further ground for holding that the plaintiff is entitled to succeed. There was here interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works.

[26] In *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor*, the Supreme Court through the judgment of Peh Swee Chin SCJ applied the concept of non-delegable duty and this is what he said at p 239 (MLJ); p 208 (CLJ):

> If the independent contractor, that is, the third party in this case was not involved, then there could not be the slightest doubt that the Datuk Bandar, ie the defendant

was liable. However, it was repeatedly submitted that the defendant was not liable for default or negligence of his independent contractor whom the defendant chose and whose competence was not disputed by any party. Could therefore the blame for the plaintiff's misfortune be shifted on to the shoulders of the defendant's independent contractor in the circumstances of this case?

While the rule that an employer of an independent contractor is not liable for the default or negligence of such contractor no doubt exists, there are exceptions, and it is outside the province of this judgment to elaborate all the exceptions but only briefly to deal with them except those which are directly concerned with the instant case.

First exception is where an employer has not exercised care in selecting a competent contractor as was much pressed in argument in the present case. Second exception is a group of cases or situations when the duty to take care is said to be 'non-delegable'. A non-delegable duty to take care means in effect that the employer would have to see to it that such duty of care is exercised, whether by his contractor or not, otherwise he would be equally liable as the contractor, in addition, in most cases, to the liability of his contractor. Such non-delegable duty exists in the case of work causing withdrawal of support to neighbour's land, see *Bower v Peat* [1876] 1 QBD 321; work done on a highway, see *Tarry v Ashton* [1876] 1 QBD 314; cases of a master's duties for his servant's safety at common law, see *Wilsons & Clyde Coal Co v English* [1930] AC 57; cases of strict liability and finally cases of statutory duty imposed on certain categories of persons.

The last two mentioned exceptions require elaboration as they have considerable relevance to our instant case.

The exception in regard to cases of strict liability above mentioned refers to cases of such strict liability at common law, such as the rule in *Rylands v Fletcher*. The exception covers, inter alia, all cases involving extra hazardous acts or omissions, or situations created by them, which all involve special danger to others, please see the reference to them eg in *Salsbury v Woodland* [1970] 1 QB 324, such as damage by fire, see *Honeywill Stein Ltd v Larkin Brothers Ltd* [1934] 1 KB 191 so that an employer of an independent contractor, to repeat, cannot escape liability by delegating the work to such independent contractor.

In our view, the situation described earlier as facing the plaintiff was a situation created by such an extra hazardous act or omission involving special danger to such users of that lift. The defendant could not escape such liability entrusted to or by entrusting to the third party. That is why we confirmed the judgment of the High Court against the defendant in favour of the plaintiff for this reason alone.

[27] We found that the factual matrix in the above quoted cases have substantial similarity to the factual matrix here. That being the case, we had no problem in holding that the concept of non-delegable duty ought to apply here. Further we were of the view that public policy demands that public utilities providing essential services to the community cannot extinguish their duty of care by subcontracting it to an independent contractor as in this case.

CONCLUSION

[28] This was a case where in our view the appellant had been able to establish that the concept of non-delegable duty must be applied. The determining factors were that both the appellant and the first respondent are public utiliies vehicles providing essential public services and the excavation works were executed on a public road making such works hazardous to the public.

[29] For reasons stated above, we allowed the appeal with costs in the sum of RM30,000 for here and below subject to payment of allocatur fees. We also set aside the High Court orders to the extent of this appeal and entered judgment for the appellant in the sum of RM1,499,983.60 with interest of 5%pa from the date of judgment to settlement and general damages to the assessed with interest of 5%pa on the amount of general damages from date of assesement of the general damages to settlement. Deposit to be refunded.

Appeal allowed, the High Court's decision set aside to the extent of this appeal, TNB's claim against Syabas allowed and ordering of the general damages to be assessed.

Reported by Ashok Kumar